No. 86 2003

Supreme Court, U.S.
FILED
JUN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DONALD BRAUNER - - - - - Petitioner

versus

MITCH McCONNELL, et al. - - - Respondent

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

HARGADON, LENIHAN, HARBOLT
& BREEN
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Counsel for Petitioner

June 10, 1987

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

24 pp

QUESTIONS PRESENTED

Does § 504 of the Rehabilitation Act (29 U.S.C.S. § 794) require a county jail that has received federal funds to be accessible to inmates who are physically handicapped like the Petitioner?

LIST OF ALL PARTIES TO THE PROCEEDING

DONALD BRAUNER
Apartment 6, Angora Court,
Louisville, Kentucky 40206 .....Plaintiff

MITCH McCONNELL, individually and as
County Judge Executive and
Jefferson Fiscal Court;

DARRELL OWENS,
SYLVIA WATSON, and
JIM "POP" MALONE, individually and as
members of the Jefferson Fiscal Court;

JEFFERSON COUNTY DEPARTMENT
OF CORRECTIONS,
Hall of Justice, Louisville, Kentucky;

RICHARD FRYE, individually and as
Director of the Jefferson County
Department of Corrections;

MAJOR JOHN SKOWERS, individually and as
Director of the Jefferson County
Community Treatment Center

OWEN SITGRAVE, individually and as
an employee of the Jefferson County
Community Treatment Center

and

Jefferson County, Kentucky .....Defendants

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DONALD BRAUNER - - - - - *Petitioner*

v.

MITCH MCCONNELL, et al. - - - *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The bench order of the United States Court of Appeals is unreported and is printed in Appendix A hereto, *infra,* page 1a. The opinion of the United States District Court is printed in Appendix A hereto, *infra,* page 4a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1987. This Court has jurisdiction under 28 U.S.C.A. § 1254 (1).

STATUTES AND REGULATIONS INVOLVED

This case involves 29 U.S.C.S. § 794 (1982), which provides as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 7(7) [29 USCS § 706 (7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

In addition, 31 C.F.R. § 51.2(k), which pertains to financial assistance to state and local governments, states:

> "Program or Activity" means the operations of the agency or organizational unit of a recipient government or the operations or organizational unit of a secondary recipient funded with entitlement funds (examples include, but are not limited to a police department, department of corrections, health department, or a division of a public or private corporation).

STATEMENT OF THE CASE

On August 15, 1983, Petitioner, a paraplegic, was sentenced by the Jefferson District Court to serve

eleven months in the Jefferson County Corrections Department. Petitioner was at first placed in the Hall of Justice facility, where he remained for two days. While incarcerated at this facility, Petitioner was deprived of his wheelchair, so he was unable to move from his bunk. Petitioner's cell had no handicapped rails or bars and the commode was inaccessible. Petitioner was unable to clean his urinary catheter or move his bowels.

Petitioner was then transferred to the Community Treatment Center (CTC), a minimum security facility, where he was allowed his wheelchair. However, CTC has no ramps for wheelchairs and the restrooms and showers had no fixtures to make them accessible to the handicapped. Petitioner was released every other day for three hours to go home to bathe and go to the bathroom. He was carried in and out of the CTC by other inmates. While incarcerated at the Hall of Justice, Petitioner was told to empty his catheter on the floor of his cell. He contracted an infection and scarring of the foreskin as a result of the fact that he could neither adjust nor clean his catheter properly.

From 1978 through 1985 the Jefferson County Corrections Department received over $2.5 million in federal grants. Several renovation projects involving significant structural modifications were also undertaken by the Corrections Department during that time period.

The United States District Court for the Western District of Kentucky had jurisdiction of this case, since

it involves a claim based upon a federal statute. The District Court granted summary judgment to the Respondents on March 25, 1986, on the grounds that the Corrections Department was not a "program or activity" within the meaning of § 504 of the Rehabilitation Act of 1973, as amended [29 U.S.C.S. § 794]. The Court also ruled that Petitioner was not a "qualified handicapped individual" within the meaning of the Act, and that it would be contrary to the purpose of the Act to allow him to bring this action.

The United States Court of Appeals for the Sixth Circuit, in an order dated March 13, 1987, affirmed from the bench the judgment of the District Court.

We seek review and reversal of the grant of the summary judgment to the Respondents.

REASONS FOR GRANTING THE WRIT

1. The District Court decided that "involuntary incarceration" was not a "program or activity" as defined in 29 U.S.C.S. § 794, even after noting that the Metropolitan Correctional Services Department receives federal assistance. The Court of Appeals affirmed. This decision conflicts with the reasoning in *United States Department of Transportation* v. *Paralyzed Veterans of America,* 106 S. Ct. 2705 (1986). In that case, this court limited the scope of 29 U.S.C.S. § 794 to those who actually receive federal financial assistance. Although the airport operator in *Paralyzed Veterans* received federal funds, the airport itself had not been charged with discrimination; only

the commercial airlines, beneficiaries of the funds, had been charged. It is clear that the airport in *Paralyzed Veterans* was considered a "program or activity". Therefore, the airport operator would not be allowed to discriminate against the handicapped by making the airport inaccessible to them. In the present case, the Metropolitan Correctional Services Department, a recipient of federal funds, has been allowed to discriminate against the physically handicapped by making its jail facilities inaccessible.

The federal treasury regulations also support this argument. They provide as follows:

> "Programs or Activity" means the operations of the agency or organizational unit of a recipient government or the operations or organizational unit of a secondary recipient funded with entitlement funds (Examples include, but are not limited to a police department, department of corrections, health department or division of a public or private corporation). 31 C.F.R. § 51.2.

Under this definition the defendant's jail itself would qualify as a program or activity under § 794.

In *Strathie* v. *Department of Transportation,* 716 F. 2d 227 (3rd Cir. 1983), the court stated,

> In order to make out a case under section 504 of the Rehabilitation Act, a plaintiff must prove (1) that he is a handicapped individual under the Act, (2) that he is "otherwise qualified" for the position sought, (3) that he was excluded from the position solely by reason of his handicap, and (4)

> that the program or activity receives federal financial assistance.

The issue is whether the corrections department, which operates the jail, receives federal financial assistance. If so, the facilities it operates must be made accessible to the handicapped. *Strathie* was reaffirmed in *Sullivan* v. *City of Pittsburgh, Pa.*, 811 F. 2d 171 (3rd Cir. 1987).

In *Alexander* v. *Choate,* 105 S. Ct. 712 (1985), this court stated that elimination of architectural barriers was one of the central aims of the Act, even though not erected with the aim or intent of excluding the handicapped.

> In enacting the Rehabilitation Act and in subsequent amendments, Congress did focus on several substantive areas — employment, education, and the elimination of physical barriers to access — in which is considered the societal and personal costs of refusals to provide meaningful access to the handicapped to be particularly high. *Alexander* at 724.

Further support is found in *Disabled in Action of Pennsylvania* v. *Pierce,* 789 F. 2d 1016 (3rd Cir. 1986). In that case, the United States Department of Housing and Urban Development (HUD) planned to move to newly renovated offices. Disabled in Action of Pennsylvania, Inc., (DIAP) filed a class action complaint against HUD for declaratory and injunctive relief, contending that HUD was denying the handicapped equal access to this office space in violation of

section 504 of the Rehabilitation Act of 1973, 29 U.S.C.S. § 794 (1982). *Id.* at 1017. The district court "held that the Rehabilitation Act provided a remedy in addition to and independent of the Architectural Barriers Act, but that the government was correct in its contention that the Uniform Federal Accessibility Standards applied." *Id.* at 1018.

Journey v. *Vitek,* 685 F. 2d 239 (8th Cir. 1982), generates a conflict with the reasoning of other circuits and this court. In that case, the court held that a prisoner confined to a wheelchair and in custody of the Nebraska Correctional Department Services was not excluded from participation in any program or activity, and had not been subjected to discrimination under any program or activity. However, in that case the plaintiff was assigned to the infirmary where he received adequate health care. In *Journey,* the issue of whether any program or activity of the Department of Correctional Services was included within the definition of "any program or activity receiving financial assistance" *was specifically not denied.*

2. This court held that an "otherwise qualified" handicapped individual is one who can meet all of a federally funded program's requirements in spite of his handicap. *Southwestern Community College* v. *Davis,* 442 U. S. 397, 99 S. Ct. 2361 (1979). The only requirement for being incarcerated is that one be convicted of a crime and sentenced to a jail term. Petitioner was convicted and sentenced. He therefore met all of the requirements of the program (the pro-

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gram being the jail), the operator of which received federal assistance. He is therefore "otherwise qualified" under this court's definition. The protection of 29 U.S.C.S. § 794 is needed even more than in *Davis,* since Petitioner's stay in jail was involuntary. Nonetheless, the Court of Appeals held that Petitioner was not "otherwise qualified". These incongruous decisions leave the meaning of § 794 in disarray.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HARGADON, LENIHAN, HARBOLT, & BREEN



RICHARD M. BREEN
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Louisville, Kentucky 40202
(502) 583-9701

Counsel for Petitioner

June 10, 1987

APPENDIX

APPENDIX

No. 86-5447

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DONALD BRAUNER, - - - - *Plaintiff-Appellant,*

v.

MITCH MCCONNELL, Et Al., - *Defendants-Appellees.*

ORDER — Filed March 13, 1987

Before: ENGEL, KRUPANSKY and GUY, Circuit Judges.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

(s) Leonard Green
Leonard Green, Chief Deputy

[LETTERHEAD OF UNITED STATES COURT OF APPEALS]

May 14, 1987

Mr. Franklin Reid, Clerk
U.S. District Court
P.O. Box 756
Jackson, TN 38301

Re: Case No. 86-5447
Brauner v. McConnell
Dist. Ct. No. 84-0652

Dear Mr. Reid:

Enclosed please find:

(xx) the mandate issued in the above-styled case;
( ) the Court's slip opinion;
( ) a certified copy of the Court's order;
(xx) the certified record;
( ) the certified record was never sent to this Court on appeal.

Please acknowledge receipt of the above on the enclosed copy of this letter and return it to this office.

Yours very truly,
John P. Hehman, Clerk
(s) Michelle D. Marr
Deputy Clerk
(Ms.) Michelle D. Marr

The enclosed record consists of 1 vols. pleadings, —— vols. transcripts, 5 vols. depositions, —— vols. exhibits.

Name and Title of Authorized Agent
for District Court or NLRB

cc: w/enclosure
Mr. Richard M. Breen
Mr. Allen Dobb, III

No. 86-5447

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DONALD BRAUNER, - - - - *Plaintiff-Appellant,*

v.

MITCH MCCONNELL, Et Al., - *Defendants-Appellees.*

ORDER — Filed March 13, 1987

Before: ENGEL, KRUPANSKY and GUY, Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

(s) Leonard Green
Leonard Green, Chief Deputy

Issued as Mandate: 5/14/87

Cost: none

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 84-0652-L(B)

DONALD BRAUNER - - - - - - - *Plaintiff*

v.

MITCH MCCONNELL, Et Al. - - - *Defendants*

MEMORANDUM — Entered March 25, 1986

Plaintiff, a paraplegic, commenced this action against Jefferson County officials and employees invoking the Court's jurisdiction under Title 42 U.S.C. Section 1983 and Section 504 of the Rehabilitation Act, Title 29 U.S.C. Section 794.

Plaintiff alleges that on August 11, 1983, he was sentenced to 11 months in jail for driving while intoxicated. He was discharged from jail after he was granted "shock" probation. The gravamen of his complaint is that since the Jefferson County Jail where he was confined for about a day-and-a-half and the Community Treatment Center where he served the balance of his sentence are inaccessible to persons with handicaps like or similar to his, he is afforded a remedy under the two statutes set out above. By his second amended complaint,[1] he attempts to assert a pendent state claim under the Kentucky Building Code and, specifically, KRS 196B.260.

The action is a novel one so far as our research has disclosed. The Court has found actions in which handi-

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[1]His first amended complaint added Jefferson County as a party.

capped prisoners are denied access to rehabilitation or vocational services, *Journey* v. *Vitek*, 685 F. 2d 239 (8th Cir. 1982), but we find no case treating the precise issue before the Court.

The Court agrees that Section 504 of the Rehabilitation Act may support a private right of action. See *Pushkin* v. *Regents of University of Colorado*, 658 F. 2d 1372 (10th Cir. 1981). The Court further has no quarrel with the proposition that Section 504 will provide the necessary support for a Section 1983 action. *Id.* at 1382. Our inquiry must go to the applicability of Section 504 to the factual situation before the Court.

The purpose of the Rehabilitation Act is set out in Title 29 U.S.C. Section 701: "The purpose of this chapter is to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living."

The pertinent language of Title 29 U.S.C. Section 794 reads:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."

Throughout all of the authorities the Court has reviewed there runs a common thread of rehabilitation or educational opportunities. The Act itself refers to an "otherwise qualified handicapped individual." A handicapped individual" is defined for purposes of Section 504 as:

> "Subject to the second sentence of this subparagraph, the term 'handicapped individual' means, for

> purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of *the job in question* . . . ." (Emphasis added.) Title 29 U.S.C. Section 706(7)(B).

The Court concludes that it would do violence to the legislative intent of the Rehabilitation Act to expand it to include involuntary incarceration within the definition of a "program or activity," nor are we willing to hold that a prisoner is an otherwise qualified handicapped individual. The question which immediately leaps to mind is: Otherwise qualified to do what?

The Court finds that Section 504 has no application here. This finding compels the conclusion that plaintiff has not been deprived of any right, privilege or immunity secured by the Constitution and laws. Title 42 U.S.C. Section 1983. Finding no deprivation of any federal right, the Court can reach no conclusion but that plaintiff cannot satisfy the first element set forth in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 90 S. Ct. 1598 (1970):

> "The terms of § 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or

> usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.' " 398 U. S. at 150, 90 S. Ct. at 1604.

The Court determines that defendants' motion for summary judgment should be granted,[2] and plaintiff's motion for summary judgment should be denied. Having reached this decision, the Court declines to accept pendent jurisdiction. See *United Mineworkers of America* v. *Gibbs,* 383 U. S. 715, 86 S. Ct. 1130 (1966).

An appropriate order has been entered this 25th day of March, 1986.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel

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[2]Defendants' motion is premised on the assertion that the Metropolitan Correctional Services Department receives no federal assistance. This assertion is simply wrong. See Deposition of defendant Richard Frey at page 5.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 84-0652-L(B)

DONALD BRAUNER - - - - - - - *Plaintiff*

v.

MITCH MCCONNELL, Et Al. - - - *Defendants*

ORDER — Entered March 25, 1986

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the motion of the defendants, Mitch McConnell, Darrell Owens, Sylvia Watson, Jim (Pop) Malone, Jefferson County Department of Corrections, Richard Frey, Major John Skowers, Owen Sitgrave, and Jefferson County, Kentucky, for summary judgment on the claim of the plaintiff, Donald Brauner, against them be and hereby is granted.

It is further ORDERED that the motion of the plaintiff for summary judgment on his claim against the defendants be and hereby is denied.

It is further ORDERED that this action be and hereby is dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 25th day of March, 1986.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel